IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION.

CRIMINAL APPEAL NO. 453 OF 2000

Rakhmaji Ramchandra Jadhav ....Appellant.

versus

The State of Maharashtra ..... Respondents.

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Shri Ashok T. Gade for V.M.Thorat for the appellant.
Mrs. P.H.Kantharia APP for the State.

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CORAM ; V.G.PALSHIKAR &
ANOOP V. MOHTA, JJ.

DATED; 15TH SEPTEMBER, 2004.

ORAL JUDGMENT (Per Palshikar,J.);

1. Being aggrieved by the order of conviction passed by the II Additional Sessions Judge, Solapur in Sessions Case No.247 of 1999 under section 302 of IPC on 29-6-2000, the appellant has preferred this appeal on the grounds mentioned in the memo of appeal as also orally canvassed before us.

2. With the assistance of the learned counsel for the accused and the learned Prosecutor, we have scrutinised the records of the case and re-appreciated the evidence on record.

3. The prosecution case as emerges from the re-appreciation of evidence stated briefly is that the accused was married to Mangala for last 20 years and has a son who is mentally retarded. On 20-9-1999 around 3.00 a.m. accused/appellant went to his father-in-law and informed him that his wife Mangala had sustained burn injuries and he also has burnt his hand. Injured Mangala was taken to civil hospital by the appellant and his in-laws. At the hospital the matter was informed to the police and police were requested to arrange for recording statement of the victim Mangala. The statement accordingly was recorded by the Executive Magistrate around 9.45 in the evening of 21st September 1999. According to the statement the burn injuries were caused by the accused/appellant and therefore the accused was prosecuted. After the investigation was completed he was duly charge sheeted and tried in the Court of Sessions at Solapur.

4. The prosecution has examined 13 witnesses to prove its case that the accused was responsible for the homicidal death of the victim Mangala and he caused it intentionally. Therefore he was guilty of murder as he was charged with. On appreciation of the oral evidence the learned trial Judge came to the conclusion of guilt and convicted the accused as aforesaid. It is this order of conviction, which is impugned in this appeal

on the grounds mentioned in the memo of appeal as also orally canvassed by Shri Ashok Gade the learned advocate appearing on behalf of the accused/appellant. He pointed out that the dying declaration of the victim suffered from several material infirmities and it is therefore not liable to be accepted, particularly in view of the fact that the very existence of the document is rendered doubtful. The learned counsel Mr. Gade pointed out that two dying declarations have been recorded. In one it is observed that left thumb impression of the victim has been taken. In the second it is observed that right hand thumb impression of the victim has been taken because her left hand was burnt. If that was so, how the first dying declaration bears the left hand thumb impression, was the querry raised by the learned counsel for the appellant.

5. Mr. Gade then pointed out that there are material discripancies in the evidence also. He led great emphasis on the fact that P.W.2 brother of the victim, P.W.3 father of the victim and P.W.4 mother of the victim had not supported the prosecution case and were therefore declared hostile. According to the learned counsel the fact that they turned hostile because they believed that the victim Mangala did not die at the instance of the accused. We need not go into the reasoning of why the witnesses have turned hostile.

But the fact remains that they did turn hostile. The learned counsel then took us to the evidence of P.W.5 the doctor who examined the victim and the accused, on admission and who has stated that the accused also suffers certain burn injuries on his hand. P.W.6 is another doctor who examined the victim Mangala at the time of recording of the dying declaration. P.W.7 is the doctor who conducted the post martem and proved that the death of Mangala was homicidal. P.W.8 is the Special Executive Magistrate who recorded the dying declaration Exh.21 between 10 and 10-35 in the night of 20-9-1996. P.W.9 is the Police constable who recorded the first dying declaration of the victim at 7.30 in the morning on getting information in the police station that a victim of burning is in serious condition and admitted in the hospital. P.W.10 is another police constable who took the articles to Forensic Science Laboratary. P.w.11 is the doctor who certified the dying declaration recorded by P.w.8 the Executive Magistrate and P.w.12 is another constable whom the accused has stated that the burns of Mangala were caused by accidental fall on a candle. P.w.13 is the investigating officer.

6. As contended by the learned counsel for the appellant, we will have to examine both the dying declarations to find out whether serious infirmities as

pointed out by the learned counsel exists in the dyring declarations. The first dyring declaration on the point of time is Exh.16 which was recorded around 7.30 in the morning of 20-9-1999. In this declaration, the victim says that her husband came home around two in the night. He was drunk and was abusing the victim with reference to one Tanuja. On the victim saying to sleep since you are drunk, the husband tried to throttle her neck by both of his hands and the victim started shouting, on that the accused poured kerosene on the body of the victim , put her on fire and left the house, clossing the door. When she says that thereafter she was severaly burnt and was taken to hospital by her mother and husband. She then went on to state that because of his adiction of alcohol the accused has beaten her, tried to throttle her and put her on fire. This dying declaration was recorded by Police Head Constable P.w.9. This witness has categorically stated in his examination-in-chief that he recorded the dying declaration of injured Mangala as per her say in presence of Dr. Lahoti and thereafter took left hand thumb mark of Mangala. The concerned doctor who endorsed this dying declaration Exh.24 is P.w.6 Dr. Jeevan Lahoti. He states that when the statement was being recorded the patient was conscious oriented and in a fit state of mind to give statement. He proved his endorsement on Exh.24 as recorded by

P.w.9 and proved it as Exh.16. He has stated that he had examined the victim before and after the statement and found her in a fit state to give the statement. It will thus be seen that we have Exh.24 as written by P.w.9 police constable with an endorsement Exh.16 given by Dr. Jeevan Lahoti P.w.6. This was recorded between 7.30 and 7.45 in the morning of 20-9-1999.

7. It is pertinent to note that Dr. Jeevan has deposed in his cross examination that the condition of the patient was serious due to 79% burn injuries. There was dehydration and loss of plasma of the body. He admits that due to dehydration and loss of plasma, condition of the patient becomes weak. Thus Exh.24 has duly proved by the person who wrote it. The doctor has proved his signature at Exh.16 who says that the patient was conscious and in a fit state of mind to give statement.

8. That takes us to the second dyring declaration recorded by the Executive Magistrate, who is examined as P.w.8. He states that he was requested to record the statement of the victim by the police and the attending doctor examined the patient and declared that patient was conscious and was in a condition to give statement. He therefore recorded the statement. It bears the endorsement of the doctor and this witness.

P.w.8 has deposed in court, which deposition is Exh.20. He proved the dying declaration recorded by him as Exh.21 and the doctor who certified the condition of the patient, has proved his endorsement as Exh.32. We will now consider what this dying declaration has to allege.

9. In this statement victim Mangala gives a brief history how her husband was drunkard and womanise, how he used to quarrel with her every now and then and how around 2.30 in the night, he poured kerosene on her and put her on fire. She states that she was put on fire by her husband and nobody came to put off the fire. Then she states that after the saree was entangled completely, her husband tried to drowse it. She then states that except her husband she doubts no one else and then the statement/declaration ends. This bears the endorsement of the Executive Magistrate who declares that the right hand thumb impression of the victim was taken on the declaration. This also bears a certificate by the attending doctor. This witness P.w.8 states in his examination that after the statement was recorded, he took thumb impression of the victim on the statement. In his cross examination he admits as under:

"As Mangala had received burn injuries on

left hand thumb, her right thumb mark was taken on the dying declaration, Exh.21."

10. We thus have two dying declarations made by the same person with thumb mark of the victim. On one it is right hand thumb and on the other it is left hand thumb. We have the testimony of the police who recorded the first declaration and the Executive Magistrate who recorded the second declaration, unequivocally saying that the thumb mark was taken as the other hand was injured, creating a peculiar situation as to whether it was right hand which was burnt or the left hand which was burt, or both the hands were burnt.

11. In one dying declaration the victim says she was burnt by her husband and he bolted the door and went out of the house. In second she says that she was put on fire by the husband and the fire was entangled her completely then he tried to drowse it. There is material difference between these two statements. From these statements itself, it is obvious that she was very much annoyed with her husband for his womanising and drunkardness. Therefore she involved the appellant which resulted in her giving two different dying declarations. In one she says the husband went away

and in another she says that her husband tried to put of the fire. In one the cause is quarrel over Tanuja and another it is habitual drunkardness. These material contradictions in the two declarations therefore creates serious doubts about the genuineness of either of them. In any event there has to be some corroboration before they can be safely accepted and was the prosecution has miserably failed with father, mother and brother of victim who have turned hostile. They have not supported the prosecution case that the appellant had burnt his wife. Apparently there is no reason why they would be shield the appellant if they believe to some extent that he was responsible for the death. This further gives doubts to the fact that the death of Mangala was accepted as accidential by her parents. It is on record that it was the appellant who told the police of accidental burning of Mangala. His hands were also burnt and he has been examined by the doctor. The wife herself in one of the two declarations admits that it was the husband who drowse the fire. In such circumstances, in the absence of any corroborative evidence and in existence of some glairing defect in the dying declarations, it becomes extremely unsafe to convict the accused on the basis of such scandy evidence. In our opinion, the learned trial Judge was therefore in error in accepting these declarations. In our opinion he could not have, on the

evidence as available, convict the accused of murdering his wife.

12. In our opinion the appeal deserves to be allowed and is hereby allowed. The accused is in jail. He should be released forthwith if otherwise not required in any other matter. Office to issue necessary writ at the earliest as possible. Appeal accordingly disposed of.

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